

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on August 6, 2008 appellant, then a 53-year-old letter carrier, sustained a lumbar sprain in the performance of duty under File No. xxxxxx790. He stopped work on May 28, 2009 and returned to modified employment on January 21, 2009.

On June 3, 2009 appellant filed a notice of recurrence of disability on May 28, 2009 causally related to the August 6, 2008 work injury. In a statement dated June 27, 2009, he related that he had back pain after he returned to limited duty and that repeatedly twisting while casing mail increased his back strain. OWCP advised appellant that, as he attributed his condition to new work duties, it was adjudicating the notice of recurrence of disability as an occupational disease claim. It assigned the claim File No. xxxxxx045.

In a report dated February 18, 2009, Dr. William Matarese, a Board-certified orthopedic surgeon, noted that appellant experienced radicular pain after returning to work in January 2009. On March 18, 2009 he diagnosed lumbosacral radiculitis and lumbar degenerative disc disease.

On July 2, 2009 the employing establishment controverted the claim, asserting that it provided work within appellant's restrictions and that he had not submitted supporting medical evidence.

By decision dated August 17, 2009, OWCP denied appellant's claim. It found that the medical evidence was insufficient to establish that he sustained a diagnosed condition causally related to the accepted work factors.

On August 27, 2009 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative.

In a report dated November 10, 2009, Dr. Mark Filippone, a Board-certified physiatrist, reviewed appellant's history beginning in 1986 of both work-related and nonemployment-related back injuries. Appellant returned to modified employment after his 2008 work injury but stopped on May 29, 2009 due to increased back pain radiating into the lower extremities. Dr. Filippone diagnosed lumbosacral radiculitis and to rule out lumbosacral radiculopathy, plexopathy and sciatic neuropathy. He stated, "In my professional medical opinion, the above abnormal presentation is directly and solely the result of injuries sustained while at work as a letter carrier and as a truck driver as stated above." Dr. Filippone noted that appellant was unable to work beginning May 29, 2009 due to back pain radiating into the lower extremities. He stated, "[Appellant] relates that he hurt himself pulling down work and doing the above activities and his subjective and physical complaints agree with the overall physical presentation." Dr. Filippone interpreted a magnetic resonance imaging (MRI) scan study as showing degenerative changes with disc bulging at L2-3 to L5-S1 and a median disc protrusion at L4-5 with foraminal narrowing. He asserted that appellant was totally disabled because of the job-related injuries since May 29, 2009.

On February 5, 2010 OWCP's hearing representative vacated the August 17, 2009 decision. He reviewed a physician's report in File No. xxxxxx790 finding that appellant sustained only a soft tissue injury and Dr. Filippone's finding that he was unable to work as a

result of an employment injury.² The hearing representative found that Dr. Filippone's report was sufficient to warrant further development. He instructed OWCP to combine the present case with File No. xxxxxx790 and refer appellant for a second opinion examination. The hearing representative also instructed OWCP to describe all of his prior work injuries to the low back in its statement of accepted facts (SOAF).

In a report dated April 28, 2010, Dr. Wayne J. Altman, a Board-certified orthopedic surgeon and OWCP referral physician, diagnosed lumbar spine arthritis. He found that appellant could perform modified employment. In a supplemental report dated June 11, 2010, Dr. Altman opined that appellant had no low back condition as a result of his light-duty employment.

By decision dated June 23, 2010, OWCP denied appellant's occupational disease claim. It found that Dr. Altman's opinion represented the weight of the evidence and established that he had no condition due to the identified work factors.

On June 30, 2010 counsel requested an oral hearing. Following an October 6, 2010 hearing, on December 28, 2010, OWCP's hearing representative vacated the June 23, 2010 decision. She found that Dr. Altman did not support his opinion with sufficient rationale. The hearing representative further determined that it was unclear whether his opinion was based on an accurate factual history as he was not provided with the evidence from File No. xxxxxx790 and the SOAF did not clearly describe each injury or the requirements of his light-duty position. She remanded the case for OWCP to prepare an amended SOAF and obtain a medical opinion sufficient to resolve the question of the diagnoses due to the August 2008 work injury and whether appellant was unable to perform his modified employment beginning May 29, 2009 due to a worsening of his back condition.

On January 14, 2011 OWCP referred appellant, with an updated SOAF, to Dr. Jerome D. Rosman, a Board-certified orthopedic surgeon, for a second opinion examination. The SOAF accepted that appellant sustained lumbar sprains on May 15, 1993, August 6, 2002 and August 6, 2008 in the performance of duty. OWCP requested that Dr. Rosman address whether there were objective findings of the August 6, 2008 work injury and whether performing limited duty beginning January 21, 2009 resulted in a worsening of his back condition.

In a report dated February 5, 2011, Dr. Rosman discussed appellant's 2008 employment injury and noted that he "returned to work in January 2009 but due to his back pain he was out of work completely as of May 28, 2009. Appellant retired in May 2010." Dr. Rosman listed

² In a report dated August 19, 2009, submitted in File No. xxxxxx790, Dr. Arash Emani, a Board-certified orthopedic surgeon, discussed appellant's August 6, 2008 work injury. He noted that appellant stopped work in May 2009. Dr. Emani interpreted MRI scan studies as showing degenerative changes at L3 to L5 and lumbar spondylosis. He stated, "I do not find any causal relationship between the injury and the degenerative findings that [are] found on imaging studies and MRI scans and I am somewhat puzzled as why [he] has been out of work for what appears to be a minor soft tissue injury to the lumbar region." Dr. Emani opined that appellant could return to his regular employment.

findings on examination of equal reflexes, motor strength and intact sensation of the lower extremities. He diagnosed lumbosacral sprain and stated:

“[Appellant] has a long history of back injuries and pain predating the injury of August 6, 2008. He has MRI [scan study] confirmed degenerative lumbar disc disease and lumbar spondylosis. [Appellant’s] present complaints and treatments with physical therapy are consistent with a preexisting condition and not causally related to the accepted diagnosis of lumbosacral sprain.”

Dr. Rosman found that appellant had no further findings of lumbosacral sprain and opined that his limited-duty employment did not cause any worsening of his accepted low back condition. He found that appellant could perform modified employment and provided a work restriction evaluation listing limitations due to preexisting injuries of the lumbar spine and degenerative disc disease.

In an addendum dated April 16, 2011, Dr. Rosman stated that appellant had no objective findings of lumbar sprain on examination. He noted there was “no evidence based medicine to support the concept that a minor soft tissue injury causes permanent worsening of a preexisting degenerative spine.” In an addendum dated May 25, 2011, Dr. Rosman reiterated his prior findings and stated:

“Similarly, there is no evidence based medicine to support the concept that the limited (light)[-]duty work that the claimant does on a daily basis causes structural changes in degenerative discs beyond what occurs naturally with the activities of daily living; whether working or not.”

By decision dated June 3, 2011, OWCP denied appellant’s claim on the grounds that the medical evidence, as represented by Dr. Rosman’s opinion, did not establish that he sustained a medical condition due to the claimed work factors.

On June 9, 2011 appellant, through his attorney, requested an oral hearing. At the September 21, 2011 hearing, counsel noted that appellant had a history of multiple employment-related back conditions. He argued that Dr. Rosman did not accept that appellant had work injuries prior to August 2008 but instead found that was the date of his initial injury. Counsel contended that citing preexisting injuries as the cause of his back condition was akin to attributing his condition to prior work injuries. He further maintained that the supplemental reports were general in nature rather than specific to appellant and that the record contained a conflict in opinion.

In a decision dated December 19, 2011, OWCP’s hearing representative affirmed the June 3, 2011 decision.³ She found that appellant had not established that his limited-duty employment from January to May 2009 caused an injury.

³ OWCP’s hearing representative reported that a Dr. David Rubinfeld had performed the second opinion examination. In fact, however, Dr. Rosman performed the examination. Any error, however, would not affect the disposition of the case.

On appeal, counsel argues that Dr. Rosman's report is insufficient to constitute the weight of the evidence. He maintains that a conflict in medical opinion exists between Dr. Rosman and Dr. Filippone.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁵ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁶

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;⁷ (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;⁸ and (3) medical evidence establishing the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁹

If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹⁰

ANALYSIS

Appellant attributed his lumbar sprain to performing the duties of his modified employment from January 21 to May 28, 2009. OWCP accepted the occurrence of the claimed employment factors. It previously accepted that appellant sustained lumbar sprain due to an August 6, 2008 work injury under File No. xxxxxx790. OWCP combined both claims on the instructions of OWCP's hearing representative and further developed the evidence to determine whether appellant had further residuals of his August 6, 2008 employment injury and whether he

⁴ *Supra* note 1.

⁵ *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ *See Ellen L. Noble*, 55 ECAB 530 (2004).

⁷ *Michael R. Shaffer*, 55 ECAB 386 (2004).

⁸ *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

⁹ *Beverly A. Spencer*, 55 ECAB 501 (2004).

¹⁰ 5 U.S.C. § 8123; 20 C.F.R. § 10.321(b); *see also Darlene R. Kennedy*, 57 ECAB 414 (2006).

sustained a new back injury due to performing his limited duty from January 21 to May 28, 2009.

The Board finds that there is a conflict in medical opinion between Dr. Rosman, the OWCP referral physician, and Dr. Filippone, appellant's attending physician. In a report dated November 10, 2009, Dr. Filippone discussed appellant's history of back injuries beginning in 1986 and noted that he stopped work on May 29, 2009 after returning to modified employment following a 2008 injury. He diagnosed lumbosacral radiculitis and possible lumbosacral radiculopathy, plexopathy and sciatic neuropathy. Dr. Filippone attributed the conditions to appellant's work duties and opined that he was disabled from work beginning May 29, 2009. By contrast, Dr. Rosman found that appellant had no objective evidence of a lumbosacral sprain and that his injuries did not aggravate his preexisting degenerative lumbar disc disease. He provided work restrictions due to preexisting degenerative disc disease. The Board, therefore, finds a conflict in medical opinion.

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the employee's physician, OWCP shall appoint a third physician who shall make an examination.¹¹ The case will be remanded for an impartial medical examiner to resolve the conflict in medical opinion. On remand, OWCP should refer appellant and a SOAF to an appropriate physician to examine him and evaluate the evidence pursuant to section 8123(a) of FECA. Following this and such further development as OWCP deems necessary, it shall issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹¹ *Id.* at § 8123(a); see also *Charles S. Hamilton*, 52 ECAB 110 (2000).

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: November 14, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board